THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the First Circuit

James C. Williams, Jr., Circuit Court Judge

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S.C. Supreme Court

Opinion No. 4998
Heard December 8, 2011 – Filed July 11, 2012

D. R. Horton, Inc.,..Plaintiff,
v.
Wescott Land Company, LLC and Thomas R. Hawkins....................Defendant,

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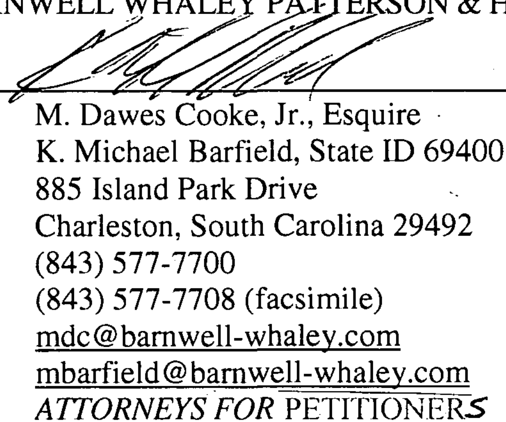
Thomas R. Hawkins and Wescott Land Company, LLC,.................... Petitioners,
v.
D.R. Horton, Inc.,..Respondent.

PETITION FOR WRIT OF CERTIORARI



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September ______, 2012
Charleston, South Carolina

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

Petitioners, pursuant to Rule 242, SCACR, Article V, § 5 of the South Carolina Constitution and S.C. Code Ann. § 14-3-310, respectfully submits this Petition for Writ of Certiorari, memorandum of law, and authorities in support of the Petition.

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 9, 2012.

QUESTIONS PRESENTED

The questions presented in this Petition are as follows:

1. Did the trial court and the Court of Appeals err in entering summary judgment on the cause of action for abuse of process?

2. Did the trial court and the Court of Appeals err in entering summary judgment on the claim for breach of contract accompanied by a fraudulent act?

3. Did the trial court and the Court of Appeals err in entering summary judgment on the cause of action for slander of title?

STATEMENT OF JURISDICTION

This court has jurisdiction over Petitioner's Petition for Writ of Certiorari pursuant to Article V, § 5 of the South Carolina Constitution and S.C. Code Ann. § 14-3-310. This Court's determination of whether to grant a writ of certiorari, while reserved to the Court's discretion, is informed by several factors:

> A writ of certiorari is not a mater of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

See Rule 242(b), SCACR. This case involves novel questions of law that merit review by the Supreme Court. For the reasons that follow, this Court should exercise its discretion to grant the Petition for Writ of Certiorari and reverse the trial court and Court of Appeals in this matter.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

A. Background Facts

1. Procedural Background

On December 4, 2006, D.R. Horton, Inc. (hereinafter "Horton" or "Respondent") filed a lis pendens on properties owned by Wescott Land Company, Inc. (hereinafter "Wescott") claiming entitlement to purchase certain lots in the Wescott development. Horton failed to file suit within twenty (20) days, therefore allowing this initial lis pendens to expire. Horton then filed another lis pendens on February 13, 2007. On February 26, 2007, Horton filed a Summons and Complaint against Wescott in the Dorchester County Court of Common Pleas for breach of contract. In April 2009, Horton filed an Amended Complaint against Wescott. In response, on April 30, 2009, Wescott filed its Answer and along with Thomas R. Hawkins (hereinafter "Hawkins")

(collectively referred to as "Appellants"), counterclaimed for breach of contract, unfair trade practices, abuse of process, malicious prosecution, breach of contract accompanied by a fraudulent act, tortious interference with prospective economic advantage, and slander of title. In May 2009, Horton filed a motion for summary judgment on Appellants' counterclaims. Following a hearing, the Court issued an Order dated September 4, 2009, granting Horton's motion for summary judgment on Appellants' counterclaims for slander of title, violation of Unfair Trade Practices Act, abuse of process, malicious prosecution, breach of contract accompanied by a fraudulent act, and tortious interference with prospective contractual relations. Additionally, the Court granted summary judgment to Horton on Hawkins' breach of contract counterclaim.

On September 19, 2009, Appellants filed a Motion for Reconsideration of the Court's September 4, 2009 Order on the Motion for Summary Judgment. After the Motion for Reconsideration was denied, the ruling was appealed to the South Carolina Court of Appeals. On July 11, 2012, this Court issued an Order affirming the trial court's grant of summary judgment to Respondent on Appellants' counterclaims for slander of title, unfair trade practices, abuse of process, malicious prosecution, breach of contract accompanied by a fraudulent act, and tortious interference with prospective economic advantage. On July 26, 2012, Appellants filed a Petition for Rehearing, pursuant to Rule 221(a), SCACR, to address issues of law and fact misapprehended and overlooked by the Court in its decision. The South Carolina Court of Appeals affirmed the trial court's summary judgment Order on August 9, 2012. This matter is now before this Court on Appellants Petition for Writ of Certiorari as Appellants respectfully request a review of that decision.

2. Substantive Facts

In November 2004, the parties to this action entered into a contract pursuant to which Plaintiff would, over a period of time, purchase some 193 lots located at The Farms, Westcott Plantation. The properties were split into three phases, the first two of which were to be single-family residences, and the third of which was intended to be townhomes. Defendant was to perform certain preliminary work, including grading, erosion control, and preparation of plans for water, sewer, storm drains, and utility layouts. The contract provided a "take down" schedule, pursuant to which closings on different portions of the property were to be held on the later of either a date certain or the date upon which Defendant had obtained final plat approval and recorded the lots.

The closings on the single-family lots, Phases 1 and 2 of the contract, were completed as scheduled. All of Phase 3, except for Phase 3E, was also conveyed to Horton, although the project was behind schedule at that point. As a result of these delays, the contract was amended, effective November 15, 2004, with respect to the work to be done, the conditions precedent to closing, and the closing schedule for the townhouse lots in Phase 3E. Specifically, Phase 3E was split into three sub-phases, with a closing schedule set forth as follows:

Phase 3E-1 (37 lots) on or before the later of January 1, 2006 or upon final plat approval and recordation;[1]

Phase 3E-2 (37 lots) on or before the later of April 1, 2006 or upon final plat approval and recordation; and

[1] Phase 3E was platted by D.R. Horton as a single tract. It is undisputed that final plat approval and recordation could not have been accomplished piecemeal. Rather, the entirety of Phase 3E would have to be Substantially Complete, as that term is defined in the Contract, before a plat could be submitted to the City for approval. (See Depo. Michael Flannery, R. p. 780, lines 8-14).

3E-3 (36 lots) on or before the later of July 1, 2006 or upon final plat approval and recordation.

Finally, the amendment required Wescott to provide Condition Precedent documentation and certifications at least twenty days prior to any scheduled closing. Because of additional delays, and for logistical purposes, none of Phase 3E was ready to close prior to the end of July 2006. However, substantial completion was reached as to all of 3E the first week of August. (See Defs.'s Memo. Opp. S.J., R. p. 120; Counter-claimant's Memo. Opp. S.J., R. pp. 560-561, Exhibit 2, R. pp. 581-582). "Substantial Completion" is a defined term within the parties' Contract that essentially means that Horton has received proof and acknowledges that all conditions precedent have been met. (See Complaint, Exhibit A, R. pp. 33-48).

On August 2, 2006, counsel for Wescott (Steven Smith) wrote to Horton to inform them that all conditions precedent to the closing of Phase 3E had been completed and that the final plat had been approved and recorded by the City of North Charleston on July 19, 2006. Smith went on to say, "[A]s all of the original closing dates have passed, the closing is triggered by the satisfaction of these conditions. Failure to close on all lots by August 9, 2006, will be considered to constitute a default under the Contract of Sale and Amendment to the Contract, dated November 15, 2004." (See Counter-claimant's Memo. Opp. S.J. Exhibit 3, R. p. 584). The timetable set forth by Smith is reflective of Paragraph 2 of the Amendment to the parties' Contract, which gave Horton twenty (20) days to confirm that all conditions precedent had in fact been satisfied from the date that Horton received notice from Wescott that the conditions had been satisfied. (See Counter-claimant's Memo. Opp. S.J., Exhibit 2, R. pp. 581-582). This twenty (20) day

due diligence period was confirmed by Ken Bagwell (hereinafter "Bagwell"), regional counsel for Horton. Bagwell responded to Smith's August 2, 2006 letter with a letter dated August 11, 2006. Bagwell's letter states:

> The conditions precedent to closing stated in Section 15 of the Contract were not satisfied with regard to the townhouse lots until the afternoon of August 9, 2006. Wescott may not require Horton to close on the purchase of any lot until at least twenty (20) days after Wescott has provided Horton documentation and certification of satisfaction of all conditions precedent to the purchase of that lot. The last of that documentation and certification for the townhouse lots was received on the morning of August 10, 2006. Horton can not be in default under the Contract for failing to close on the purchase of any of the townhouse lots until August 31, 2006, at the earliest.

While acknowledging that Horton had properly received the certifications of completion of all conditions precedent, Horton demanded that the properties be closed in three takedowns, separated by several months, notwithstanding the fact that all closing dates had passed. Bagwell proposed a second amendment to the Contract that acknowledges that the townhouse lots are now substantially complete and that establishes the new takedown schedule. (See Defs.'s Memo. Opp. S.J, Exhibit 2, R. pp. 141-142).

Wescott did not wish to enter into another Contract, which would cause further delays in the closing of Phase 3E, and declined Bagwell's offer to enter into one.

Horton grew more insistent that the parties enter into a Second Amended Contract setting forth staggered takedown dates. This is reflected in e-mail communications between Mitchell Flannery (hereinafter "Flannery"), one of the principals of Horton's Charleston office, and Tim Fraylick (hereinafter "Fraylick"), one of the owners of Wescott Land, LLC. In a September 13, 2006 e-mail from Flannery to Fraylick, Flannery stated that 36 units had been funded for the first takedown and that they were willing to close on only that takedown within two weeks. Attached to that e-mail was a proposed

Second Amended Contract. Numbered paragraph 1 to the proposed Second Amendment states: "[t]he Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract." (See Counter-claimant's Memo. Opp. S.J., Exhibit 6, R. pp. 589-591). Nowhere in this proposed Second Amendment is any indication that Horton was dissatisfied with the condition of Phase 3E or that it was taking the position that any conditions precedent had not been satisfied. (See Counter-claimant's Memo. Opp. S.J., Exhibit 2, R. pp. 581-582).

In another e-mail from Flannery to Fraylick, dated September 18, 2006, Flannery reiterates that Horton had funded the purchase of 36 units, which could be purchased in short order, and that the parties would need to enter into a Second Amendment to the Contract to dictate the timetable for the closing of subsequent takedowns. The same proposed Second Amendment was attached to the September 18, 2006 e-mail, again making no mention of Wescott's failure to satisfy any conditions precedent. What's more, this e-mail from Flannery contains an implied threat, stating, "[I]f you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." In his deposition, Flannery testified regarding his references to funding for 36 lots, stating, "I don't know whether that was a, you know, whether I was trying to get them to work with me or whether there was really money. I really don't know. I don't remember." (See Counter-claimant's Memo. Opp. S.J., Exhibit 7, R. pp. 593-595).

On October 16, 2006, Michael Shetterly (hereinafter "Shetterly"), outside counsel

for Horton, wrote to Smith. In this letter, nearly 90 days after the date that Wescott submitted proof of the satisfaction of all of the conditions precedent, and nearly 75 days after the date that Horton's in-house counsel contended that such proof was submitted, Shetterly took the position that certain conditions precedent still had not been satisfied as of mid-October. Specifically, Shetterly stated that Paragraph 15, subparts (i) and (j) had not been accomplished at all. Shetterly explained, "[C]ontrary to subpart (i), there is no evidence of erosion control in place, and D.R. Horton has not seen any 'sign-off' from a governmental authority stating erosion control has been erected. In derogation of subpart (j), no street lights have been installed on the site. Until these items are complete, the conditions precedent have not been completed." (See Counter-claimant's Memo. Opp. S.J., Exhibit 8, R. pp. 597-598).

In addition to this being the first mention of Wescott's alleged failure to satisfy certain conditions precedent, this letter misstates the requirements set forth in Paragraph 15 of the parties' Contract. Contrary to Shetterly's assertion, Paragraph 15, subpart (i) simply states, "[T]he Lot(s) shall be cleared of any trash, construction materials, debris, brush, partially constructed buildings, materials and all rights of way have been graded, seeded and strawed as may be required by any applicable governmental authority." (See Complaint, Exhibit A, R. pp. 33-48). It makes no mention of erosion control or sign-offs from any particular governmental entity. Even if Shetterly's conditions were part of the contract, at the very least a factual issue exists as to whether Wescott had taken all necessary and reasonable steps to control erosion, maintain clean jobsites, and stay within the good graces of all governmental entities overseeing the Project, including the Department of Health and Environmental Control (DHEC).

In direct contravention to Shetterly's assertion that street lights were required to have been installed, Paragraph 15(j) requires merely "[C]ontracts by Seller for the installation of street lights and street signs as required by any appropriate governmental authority and such contracts shall in no way place any financial burden upon Purchaser." (See Complaint, Exhibit A, R. pp. 33-48). In reality, Wescott did not have any authority to install street lights on what were to become publicly dedicated streets. That authority lay solely with South Carolina Gas and Electric (SCE&G), and all necessary contracts and approvals have been obtained such that SCE&G could install street lights very soon thereafter. Shetterly's letter goes on to say, however, that Horton proposes that the parties execute a Second Amendment to the contract excusing Wescott's alleged failure to satisfy these conditions and setting forth a new takedown schedule.

Over the course of the ensuing weeks, counsel for Horton and Wescott began to negotiate the terms of a new deal between the parties. Horton even appeared to acquiesce to the idea of closing all of 3E at once. However, Wescott was adamant that it would not enter into a Second Amendment to the parties' Contract except at the closing table, out of fear that Horton would use a new Amendment to insert further delays into the process. In the meantime, Wescott received written offers from KB Homes, a national builder comparable to Horton, to purchase Phase 3E at $30,000 per lot - $5,000 more per lot than the price under the Horton Contract, then increasing the proposal to $33,000 per lot. (See Counter-claimant's Memo. Opp. S.J., Exhibit 15, R. pp. 600-604).

A meeting was held on December 21, 2006 at Wescott's counsel's office, wherein the parties attempted to hammer out the details of a last-ditch effort to make their deal work. At this meeting Horton reiterated its concerns about erosion control on the site,

abandoned its earlier complaint about street lights, and for the first time raised the issue that it was concerned about the compaction of the building pads at Phase 3E. (See Counter-claimant's Memo. Opp. S.J., Exhibit 16, R. pp. 606). On December 21, 2006, Wescott conveyed the property to Hawkins.

The closing of all of Phase 3E was scheduled to take place at the office of Larry Dodds (hereinafter "Dodds"), another of Horton's lawyers, on February 2, 2007. Leading up to that closing, lawyers for both parties attempted to hammer out the final details of the Second Amendment to the parties' Contract, which was to be ratified at the closing table. As of late January 2007, the only remaining obstacle to the closing was Horton's insistence that Wescott re-do compaction tests on the building pads to certify that they were compacted to 2,000 PSF. Wescott contended that they had long since submitted proof of compaction and that the pads were in substantially the same condition as they were then.

Believing that an agreement had been reached, representatives of Wescott came to the offices of Dodds on February 2, 2007 at the appointed time to attend the closing. Dodds himself had prepared all necessary closing documents and was awaiting funds from Horton to hit his trust account. However, Horton sent no representatives to the closing. According to Horton's counsel, Shetterly, Wescott's counsel, Smith, called him from Dodds' office on February 2, 2007 to inquire as to why no one was there from Horton. Shetterly explained to Smith that he had not received final confirmation that Wescott was willing to redo the compaction tests and that that was a deal breaker for Horton. That was the last of the parties' attempts to close on the deal, and immediately thereafter Horton filed its first lis pendens against the property, preventing Wescott from

selling it to any third parties. (See Lis Pendens of D.R. Horton, filed Feb. 13, 2007, R. pp. 22-23).

Horton gave numerous and varied reasons for not closing on the sale. First, it insisted that under the contract it was entitled to purchase takedown 3E-1 and purchase the subsequent two takedowns at later dates. Months later and well after their period of due diligence had expired, Horton claimed that neither satisfactory erosion controls nor street lights were in place but still focused on the argument that the property should be closed in a series of takedowns. Thereafter, Horton finally relented and agreed to close on the entire property at once but, approximately one month before the scheduled closing, raised questions regarding the compaction of the lots—making that their new primary focus and their ultimate reason for not coming to the closing scheduled at their own attorney's office.

Wescott has always contended that Horton's myriad reasons for delaying closing on Phase 3E were pretextural and that the only real reason for its delay was that it had determined that its financial interests were best served by not closing. Phase 3E consisted of 110 townhome lots. Horton was pre-selling townhomes to consumers as the development began to take shape. Based on the Pre-Sale Contracts that Horton has produced through discovery, only 19 of 110 lots had pre-sold. To purchase more than Phase 3E-1 at one time would shift the carrying costs of the property from Wescott to Horton.

The gravamen of Wescott's tort claims in this case is that Horton used various pretexts to string the transaction out until it could determine if it could pre-sell enough units to justify abiding by the Contract. Once it decided to breach the Contract, Horton

added insult to injury by filing lis pendens, preventing Wescott from selling the property to anyone else. Thus, Horton went beyond merely breaching its contract. It used pretext to breach it and it tied up the property so that Wescott could not negotiate a sale to competing purchasers.

On February 26, 2007, Horton filed its Complaint, alleging that Wescott had breached the contract between the parties, and that Horton remained ready, willing and able to perform in a staggered manner. Horton requested damages for delay, and specific performance. Between the time of the commencement of the negotiations regarding the closing schedule and the time of the filing of the Complaint – a period comprising some six months – Horton filed a number of lis pendens on the property as well. These were filed at the RMC Office of Berkeley County, but were never served. After the filing of the Complaint, Defendant Wescott filed Counterclaims, which were subsequently amended.

ARGUMENTS

A. The trial court and the Court of Appeals Erred in Holding that Plaintiff was Entitled to Summary Judgment on the Cause of Action for Abuse of Process

In the present case, the Court of Appeals held that "Appellants failed to submit even a scintilla of evidence that Horton engaged in a willful act in the use of the process not proper in the conduct of the proceeding, and the trial court properly granted Horton's motion for summary judgment on Appellants' abuse of process claim." D.R. Horton, Inc. v. Wescott Land Company, LLC, Op. No. 4998, (S.C. Ct. App. filed July 11, 2012). In light of the evidence presented in the Record on Appeal, this conclusion is wholly untenable. Respectfully, Appellants would argue that in reaching its decision, this Court ignored

material facts in the record, misconstrued the ambit and application of S.C. Code Ann. § 15-11-10 (2005), and erroneously construed Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991), which is controlling authority in this case. Moreover, the interpretation of what constitutes "a willful act in the use of the process not proper in the regular conduct of the proceedings" remains a novel question of law. Appellants submit that the cause of action for abuse of process exists to serve as a deterrent to the filing of groundless proceedings, such as a lis pendens, and as such, Horton's improper use of the lis pendens should be considered in that context.

In Broadmoor, the South Carolina Supreme Court set forth the requirements for an abuse of process claim as follows: "There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings." Id. at 486 (citing Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967). This Court has opined that the Broadmoor case is distinguishable from the facts of this matter; however, Appellants contend that upon close inspection, the factual scenarios are analogous. D.R. Horton, Inc. v. Wescott Land Company, LLC, Op. No. 4998, (S.C. Ct. App. filed July 11, 2012). Furthermore, even acknowledging putative factual difference between the case at bar and Broadmoor, Broadmoor nevertheless controls and counsels. In its opinion, this Court notes that the South Carolina Supreme Court did not specifically address the second element of an abuse of process claim in Broadmoor. Id. Nevertheless, while the Broadmoor opinion's discussion of this element was at best terse, the Court nevertheless found that the party "willfully abused the process, with the ulterior purpose of preventing a sale to third parties in hopes of obtaining financial backing with which to purchase the

property at an advantageous price." Broadmoor, 306 S.C. at 487. Horton's conduct, when viewed through the prism set forth in Broadmoor, unquestionably suggests that the grant of summary judgment in favor of Horton was erroneous. Put simply, this Court has ample evidence before it to find that a genuine issue of material fact exists as to whether Horton willfully abused the process of filing a lis pendens with an ulterior purpose of preventing the sale of the land to third parties. (See R. pp. 288 and 71-72).

Furthermore, in its opinion this Court cited Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 73, 567 S.E.2d 251, 255 (Ct. App. 2002), for the proposition that "[i]t 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. The filing of a lis pendens to prevent the sale of property to a third party has been found to constitute an ulterior motive. Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991). Under Broadmoor, the evidence in the record is sufficient to create a genuine issue of material fact and this Court erred by upholding the trial court's usurpation of the jury's role to determine this contested point. Appellants' ulterior purpose allegation was clearly accompanied by an allegation that the lis pendens process was misused by the filing of the lis pendens, which was not for the purpose for which a lis pendens was intended, but rather was for the primary purpose of tying up the property so that it could not be sold to a third party or used for any other purpose. (See R. pp. 288 and 71-72). It is not a

requirement in this cause of action that Wescott prove that Horton had knowledge of the specific contracts being offered for the property.

Additionally, the record clearly demonstrates that Horton was buying itself time to pre-sell additional lots prior to purchasing the property from Wescott in order to minimize its carrying costs. Horton then used ever-shifting excuses as to why it would not close the deal. Appellants would argue that Broadmoor stands for the proposition that because parties to property disputes have an avenue for self-help that is unavailable to parties in other kinds of contract disputes, namely the filing of a lis pendens, that those who avail themselves of that process must be held to a heightened accountability. A jury may find that Horton did not breach its contract with Wescott, in which case there can be no claim for abuse of process. But, under Broadmoor, if the jury found that Horton did breach its contract, they could find that Horton's subsequent efforts to tie up the property and strong-arm Wescott into changing the terms of the deal was an improper use of the lis pendens statute.

Furthermore, it is necessary to consider the timing of Horton's decision to file the lis pendens after Horton chose not to show up to the closing on February 2, 2007. Horton's continuous attempts to defer the contract negotiations and closing on Phase 3E, even though the parties had reached an agreement, is evidence of the misuse of the lis pendens process to gain a favorable result for Horton. Horton clearly had an ulterior financial motive for giving a myriad of reasons for delaying closing on Phase 3E. The following excerpt from Timothy Fraylick's deposition illustrates Horton's conduct regarding Horton's deceptiveness:

A. The major one I recall is when we were told to show up on February the 2nd for a closing. They would close it or they

would go away at $30,000 a lot. Tommy Hawkins, Steve Smith and myself showed up at their attorney Larry Dodds' office for the closing. They did not transfer funds, nor did they come to the closing.

Q. And who told you that they would show up on February 2nd, 2007?

A. Tommy Hawkins and Larry Dodds, their attorney.

Q. Do you know why they didn't show up?

A. I don't know why specifically. That morning they came up with some bogus reasons like compaction tests on the lots, but none – it seemed to me just reaching for a reason not to close. They did not even transfer funds, so they had no intention to close.

Deposition of Timothy Fraylick, Page 111, Lines 6-24. (See R. p. 290).

As previously addressed in Counter-Claimants' Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, to purchase more than Phase 3E-1 at one time would shift the carrying costs of the property to Horton. (See R. pp. 771-772). Horton's desire to not take on this financial burden is evident through the deposition of Mitchell Flannery:

Q. Why was it important to Horton to close this deal in a series of takedowns?

A. Well, I mean, I think it's – That's why we negotiated the deal, to take at this time down in phases, because it's easier. It's easier economicly [sic] to take down the phases . . . .

Deposition of Mitchell Flannery, Page 22, Lines 20-25. (See R. pp. 771-772).

***

THE WITNESS I think we probably had a feel good from the top that, you know, if we had these sales that we could buy this property.

Q. Okay.

> A. I mean, that typically – it's just a phone call to the CEO and say, 'Listen, we've got this funded, or got 'em sold.' And, typically, typically, when we got 'em sold, we can buy 'em.

Deposition of Mitchell Flannery, Page 44, Lines 17 – 25. (See R. p. 569). In addition, Ken Bagwell admitted to the same conduct:

> A. So, we are trying to protect all of our investment, this property, our contract rights, buy the lots, and wrap it up as quickly as we could. But we didn't fell like we needed to atake down one hundred and ten lots and sit on them while we're trying to sell them.
>
> When we had been trying to buy the lots all along. That's we're not land developers, we're not land speculators, we're home builders, and so that's not our risk.

Deposition of Ken Bagwell, Page 32, Lines 15 – 23. (See R. p. 569).

As previously referenced, the September 18, 2006 email from Mitchell Flannery of D.R. Horton to Tim Fraylick of Wescott clearly demonstrates Horton's ability and desire to manipulate the situation for its own personal gain by achieving its own desired terms in the negotiation. In the email, Flannery states "if you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." (See R. p. 682) This manipulation goes far beyond that of Horton's "right to negotiate" with Wescott, as referenced by this Court. Moreover, the Court's assertion that the implied threat in the email does not "evince an act that is not authorized by the process" is an issue of fact that should be decided by a jury based on the conduct of Horton and the facts at issue in this case, and is not a mater of law to be decided by the trial court on summary judgment. D.R. Horton, Inc. v. Wescott Land Company, LLC, Op. No. 4998, (S.C. Ct. App. filed July 11, 2012). Horton's thinly veiled threat that it would and could tie up the property if terms favorable to it were not reached coupled with Horton's act of misusing a lis pendens

to cloud title to the property unquestionably creates a question issue of material fact as to whether its conduct rises to the level of willfully abusing the process with an ulterior purpose.

Based on the foregoing, it is evident that genuine issues of material fact clearly exist as to whether Appellants have established sufficient evidence to satisfy a claim of abuse of process. Moreover, the interpretation of what constitutes "a willful act in the use of the process not proper in the regular conduct of the proceedings" remains a novel question of law in the context of this case. Therefore, the Appellants respectfully request that the Supreme Court issue a writ of certiorari to review the final decision by the Court of Appeals on the abuse of process cause of action.

B. The trial court and the Court of Appeals Erred in Holding that Plaintiff was Entitled to Summary Judgment on the Claim for Breach of Contract Accompanied by a Fraudulent Act

Appellant Wescott respectfully requests that this Court reconsider the ruling on its cause of action for breach of contract accompanied by a fraudulent act. In reaching its decision, the court ignored material facts in the record that demonstrate that it was the Respondent, not Appellant Wescott that breached the contract to purchase the property that at issue. (See R. pp. 71, 290, 355, 624-625, 685-695). Respondent's representations induced Wescott to enter into the contract for the sale of the property. (See R. pp. 295 and 685-695). In addition, Respondent continuously represented that it would close on the properties once the preliminary work was completed. *Id.* Defendant continued to rely on these promises and extended substantial monies in furtherance of the completion of the contract. *Id.* (See R. p. 355). Wescott additionally delayed filing its own action for the breaches of contract committed by Plaintiff, in reliance on continued promises to

close timely. *Id.* Wescott continued to rely on the fraudulent promises and misrepresentations made by Plaintiff with respect to the completion of the contract. (See R. p. 295). Nevertheless, on February 7, 2007, Horton failed to show up to the closing of Phase 3E. (See R. pp. 71 and 355).

In its opinion in this case, this Court focuses on the three distinct elements of breach of contract accompanied by a fraudulent act. The Court held that Appellants had failed to put forth sufficient evidence as to the second and third elements of that cause of action, the existence of a fraudulent act and fraudulent intent accompanying a breach of contract. Appellants would argue otherwise. Ample evidence of the fraudulent intent exists in the record. Horton's attorney represented to Wescott in writing that all conditions precedent to closing had been satisfied. (See R. pp. 318). However, Horton made it very clear that it had no interest in purchasing the property until it had pre-sold lots to third parties, therefore reducing its carrying costs. (See R. pp. 771-772). In subsequent communications, Horton contradicted itself time and again saying that it would not close because this condition precedent or that condition precedent had not been satisfied. The record demonstrates that Wescott was able to show at ever turn that Horton's allegations were false. This evidence is sufficient for a jury to conclude that Horton's breach, its failure to close on the property, was made with fraudulent intent. Specifically, Horton knew that they were obligated to close, but it created fictional roadblocks in order to minimize its carrying costs. If a jury concurs with Appellants that Horton's intent was fraudulent, the existence of a fraudulent act is plain to see. In other words, if Horton knowingly breached the contract, all the while giving false excuses and attempting to remake the contract's terms, to then tie it up with a lis pendens is beyond

the pale. As discussed above, a lis pendens is an extraordinary statutory remedy. To exercise that remedy for false reasons and thereby damage the other party is certainly the type of contract contemplated by the third element of the tort. Appellants contend that based on the foregoing, summary judgment in this cause of action is not appropriate.

Furthermore, Appellants reiterate their persuasive argument that Respondent filed the lis pendens for the purpose of preventing third parties from acquiring the property and forcing the Appellants to bend to Respondent's will, which is in itself a fraudulent act accompanying Respondent's breach of the parties' Second Amended Contract. (See R. pp. 288 and 71-72). The essence of Horton's conduct amounts to underhandedly dissuading any prospective purchasers from acquiring the property at issue in the case and was clearly an intentional maneuver by Horton to cloud title on the property for to foster its own improper commercial advantages. (See R. pp. 288 and 356). At the time that the lis pendens was filed, Horton had been notified that it was in default on the parties' contract. Because Horton failed to cure its default and close on the purchase of Phase 3E, Wescott rescinded the contract. Despite Wescott's valid rescission of the contract, Horton inappropriately filed a lis pendens against the property. (See R. pp. 20, 288, and 356). This conduct when viewed in conjunction with the facts of the case and the effect on the Appellants rights, clearly amounted to fraud. Horton's fraudulent intent to cloud title on the property can be inferred from the facts of the case and the evidence that has been presented to the Court.

Therefore, it is evident that genuine issues of material fact clearly exist as to whether Appellants have established sufficient evidence to satisfy a claim for breach of contract accompanied by a fraudulent act. Moreover, a novel question of law exists as to

whether the improper filing of a lis pendens may rise to the level of fraudulent conduct and fraudulent intent in the context of this case. Therefore, the Appellants respectfully request that the Supreme Court issue a writ of certiorari to review the final decision of the Court of Appeals on the cause of action for breach of contract accompanied by a fraudulent act.

C. The trial court and the Court of Appeals Erred in Holding that Plaintiff was Entitled to Summary Judgment on the Cause of Action for Slander of Title

A novel question of law exists as to whether strict compliance with S.C. Code Ann. § 15-11-10 (2005) is satisfied where a party allows a filed lis pendens to expire and whether an expired lis pendens is entitled to absolute privilege. Appellants respectfully request the Court to reconsider its interpretation of S.C. Code Ann. § 15-11-10 (2005) and application of Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) to the present case. This Court held that "where a party allows a filed lis pendens to expire before the filing of an action, but subsequently files another lis pendens on the same property and thereafter timely files a complaint involving the same property, the filing of the lis pendens is afforded absolute privilege and may not be the basis for a slander of title action." D.R. Horton, Inc. v. Wescott Land Company, LLC, Op. No. 4998, (S.C. Ct. App. filed July 11, 2012). In so holding, the Court has overlooked the statute's requirement for strict compliance and interpreted Pond Place too broadly. Pursuant to S.C. Code Ann. § 15-11-10 (2005):

> In an action affecting the title to real property the plaintiff (a) not more than twenty days before filing the complaint or at any time afterwards or (b) whenever a warrant of attachment under 15-19-10 to 15-19-560 shall be issued or at any time afterwards or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at the time of filing his answer or at any time

> afterwards if such answer be intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action and the description of the property in that county affected thereby. If the action be for the foreclosure of a mortgage such notice must be filed twenty days before judgment and must contain the date of the mortgage, the parties thereto and the time and place of recording such mortgage.

"Since the filing of a lis pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provision is required." Pond Place, 351 S.C. at 17. As the Honorable Judge Pieper correctly concluded in his concurring opinion to this Court's July 11, 2012 Order,

> Here, it is undisputed that Horton filed a lis pendens on December 4, 2006, and did not file a complaint within twenty days. Therefore, Horton did not meet the statutory requirements for filing a lis pendens. Because strict compliance with the statutory requirements for filing a lis pendens is required, the December 4, 2006 lis pendens is invalid, and thus, is not entitled to absolute privilege.

D.R. Horton, Inc. v. Wescott Land Company, LLC, Op. No. 4998, (S.C. Ct. App. filed July 11, 2012). Although Appellants agree with Judge Pieper's conclusion regarding the failure of Horton to strictly comply with the required statutory provision, Appellants disagree with his assertion that Appellants failed to set forth a genuine issue of material fact on the elements of malice and special damages. Id. In response, Appellants request the Court to review its opinion in Solley v. Navy Federal Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012), wherein the Court set forth actions that may be interpreted as slander of title and defined the element of malice in that cause of action:

> Wrongfully recording an unfounded claim against the property of another generally is actionable as slander of title. Huff, 319 S.C. at 149, 459 S.E.2d at 891. [M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it

> caused damage, and if it is not privileged. Home Invs. Fund v. Robertson, 10 Ill. App. 3d 840, 295 N.E.2d 85, 87 (1973) (citing Gates v. Utsey, 177 So.2d 486, 488 (Fla.Dist. Ct. App. 1965). In Huff, 319 S.C. at 149-50, 459 S.E.2d at 891, the court found a jury reasonable could conclude the defendant published a false statement when she filed a lien she knew or should have know was invalid. A publication is derogatory to the plaintiff's title if the publication disparages or diminishes the quality, condition, or value of the property. Id. at 150, 459 S.E.2d at 891. The court further found the defendant's lien clearly diminished before he could complete the refinancing of the property. Id.

Id. at 204 (internal citations omitted). In addition to addressing what is actionable as slander of title and the definition of malice, the Court set forth the definition of special damages in the context of a slander of title claim as follows:

> Special damages recoverable in a slander of title action are the pecuniary losses that result "directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value cause by disparagement, and the expense or measures reasonably necessary to counteract the publication, including litigation." Huff, 319 S.C. at 150-51, 459 S.E.2d at 892 (quoting 50 Am.Jur.2d Libel & Slander § 560; citing Restatement (Second) of Torts 633). . . .

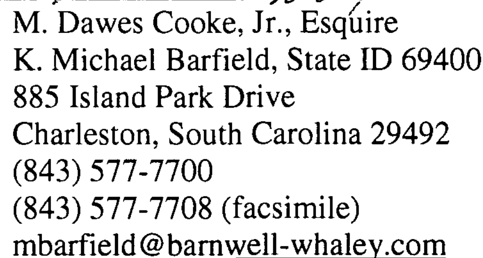
Solley, 397 S.C. at 205-206 (internal citations omitted). Appellants have consistently maintained and supported their position that Horton acted with conscious disregard of its rights by filing the lis pendens in order to strong arm it into contract terms that were favorable to Horton. (See R. pp. 72 and 89). Furthermore, Appellants have continuously asserted that the filing of the lis pendens itself caused special damages by placing a cloud on the title, which prevents the owner from freely disposing of the property before the litigation is resolved. See Shelley Construction Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 448, 491-492 (Ct. App. 1985) and (See R. p. 205, 287, 289, and 355-356). For the foregoing reasons, Appellants have clearly submitted more than a scintilla of evidence to support their cause of action for slander

of title. Any other conclusion is contrary to the Record on Appeal. Furthermore, it is evident that genuine issues of material fact clearly exist as to whether Appellants have established sufficient evidence to satisfy a claim for slander of title. Moreover, a novel question of law exists as to whether the lis pendens is entitled to absolute privilege on Appellants' slander of title cause of action due to the expiration of the lis pendens and the failure to strictly comply with the statute. Therefore, the Appellants respectfully request that the Supreme Court issue a writ of certiorari to review the final decision of the Court of Appeals on the slander of title cause of action.

CONCLUSION

For the foregoing reasons, Appellants Thomas R. Hawkins and Wescott Land Company, LLC respectfully request that this Court grant their Petition for Writ of Certiorari and reverse the trial court's entry of partial summary judgment in this matter and the Court of Appeals' affirmance of the trial court.

BARNWELL WHALEY
PATTERSON & HELMS, LLC



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September 7, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the First Circuit

James C. Williams, Jr., Circuit Court Judge

Opinion No. 4998
Heard December 8, 2011 – Filed July 11, 2012

D. R. Horton, Inc.,..Plaintiff,
v.
Wescott Land Company, LLC and Thomas R. Hawkins.....................Defendant,

---

Thomas R. Hawkins and Wescott Land Company, LLC,..................... Petitioners,
v.
D.R. Horton, Inc.,..Respondent.

PROOF OF SERVICE

I certify that I have served the Petitioners' Petition for Writ of Certioari upon the following by depositing a copy of it in the United States Mail, postage prepaid, on July 26, 2012, addressed as follows:

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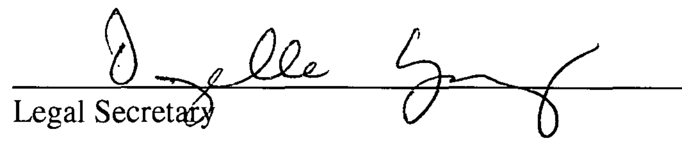

Legal Secretary

September ___9___, 2012
Charleston, South Carolina

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pm 9-7-12

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S.C. Supreme Court

September 7, 2012

SENT VIA FEDERAL EXPRESS - TRACKING NUMBER 8996 5387 1149

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

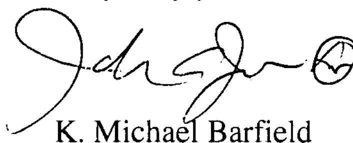
Re: D.R. Horton v. Wescott Land Company, LLC, etc.
C/A No.: 07-CP-18-0337
File No.: 3291.001
2009-145906

Dear Mr. Shearouse:

Enclosed for filing please find Petition for Certiorari in the above-referenced matter. Also enclosed are the following:

(1) Proof of service of the Petition for Certiorari;
(2) A copy of the Opinion which is to be challenged on Appeal;
(3) A filing fee of $100.

Very truly yours,



K. Michael Barfield

KMB/dly

Enclosures
cc: Neil Haldrup, Esquire
Charles E. Carpenter, Jr., Esquire
Carmen V. Ganjehsani, Esquire

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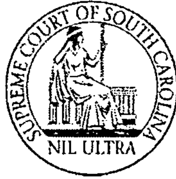

The Supreme Court of South Carolina

Barnwell Whaley Patterson & Helms 09/10/2012

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